No. 09-1390

In the Supreme Court of the United States

RENEE S. HARTZ, M.D.,

Petitioner,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGER, RICHARD & KUTCHER, LLP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

DAVID S. DALY (La. #20774)
Counsel of Record
ALLEN & GOOCH, ALC
One Lakeway, Suite 1450
3900 N. Causeway Blvd.
Metairie, Louisiana 70002
Phone: (504) 836-5290
Facsimile: (504) 836-5295
Email: daviddaly@allengooch.com

Counsel for Respondents

July 14, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's dismissal of Plaintiff's lawsuit based upon Louisiana state law principles does not represent a departure from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where Petitioner contends that the District Court made erroneous factual determinations, which factual determinations were then affirmed by the Fifth Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF PROCEDURAL FACTS 1

STATEMENT OF RELEVANT FACTS 5

REASONS FOR DENYING THE PETITION ... 14

ARGUMENT 15

I. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT ... 15

A. No Potential Cause Of Action Was Lost By Dr. Hartz During The Representation By The Chopin Defendants 15

B. The District Court Correctly Held That The Chopin Defendants Owed No Duty To Render Any Legal Advice To Dr. Hartz Concerning Legal Malpractice By Victor Farrugia 21

C. No Legal Duty On The Part Of The Chopin Defendants To Render Any Advice On Potential Legal Malpractice Claims Against Victor Farrugia 28

D. The Plaintiff Did Not Come Forth With Sufficient Summary Judgment Evidence To Support Her Legal Malpractice Claim Against The Chopin Defendants 30

CONCLUSION 35

TABLE OF AUTHORITIES

CASES **PAGE**

Askanase v. Fatjo,
130 F.2d 657 (5th Cir. 1997) 29

Bergman v. New England Ins. Co.,
872 F.2d 672 (5th Cir. 1989) 22

Brinkmann v. Dallas County Deputy Sheriff Abner,
813 F.2d 744 (5th Cir. 1987) 16

Buras v. Marx,
892 So.2d 83 (La. App. 5th Cir.
12/14/04) 25, 26, 27, 28

Cavallini v. State Farm Mut. Auto Ins. Co.,
44 F.2d 256 (5th Cir. 1995) 16

Cinel v. Connick,
15 F.2d 1338 (5th Cir. 1994) 16

Costello v. Hardy,
03-1146 (La. 1/21/04), 864 So.2d 129 21

Dahlin v. Jenner & Block,
2001 WL 855419 (N.D. Il. 07/26/01) 28

Darbonne v. Guillory,
649 So.2d 681 (La. App. 3rd Cir. 11/2/94) 19

Delta Equipment & Construction Co. v. Royal Indemnity Co.,
186 So.2d 454 (La. App. 1st Cir. 1966) 22, 23

Francois v. Reed,
97-1328, P. 4 (La. App. 1st Cir. 5/15/98), 714
So.2d 228 21

Grand Isle Campsites, Inc. v. Cheek,
262 So.2d 350 (La. 1972) 22, 23, 25, 28

Hartz v. Tulane,
275 Fed. Appx. 281 (5th Cir. 2008) 3

Harvey v. Mackay,
440 N.E. 2d 1022 (Il. 9/27/1984) 19

In Re Tx. Mortg. Services Corp.,
761 F.2d 1068 (5th Cir. 1985) 16

Joe v. 239 Joint Venture,
145 SW 3d 150 (TX 2004) 28

Lewis v. Pugh,
289 Fed. Appx. 767 (5th Cir. 2008) 16

Lifemark Hospitals, Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre,
1997 WL 33473806 (E.D. La. 1997) 22, 23

Olympia Roofing Co., Inc. v. City of New Orleans,
288 So.2d 670 (La. App. 4th Cir. 1974) 22

Oyefodun v. Spears,
669 So.2d 1261
(La. App. 4th Cir. 1996) 16, 18, 19

Payne v. Khashdel,
255 Fed. Appx. 921 (5th Cir. 2007) 16

Ramp v. St. Paul Fire & Marine Ins. Co.,
263 La. 774, 269 So.2d 239 (1972) 21

Rene S. Hartz v. Administrators of Tulane Educational Fund, University Healthcare System, LLC, et al., C.A.
No. 06-2977 (E.D. La. 2006) 1

Shelley v. Hansen,
53 Cal. Rptr. 20 (Ca. 2d Dis. 8/15/1966) 19

St. Paul Fire & Marine Ins. Co. v. GAB Robbins North America,
2008 WL 4952777 (La. App. 4th Cir. 11/19/08) 22

Steketee v. Lantz, Williams & Rotheberg,
694 P.2d 1153 (Ca. 1985) 19

STATUTES

28 U.S.C. § 1292(b) 3

Louisiana Revised Statue 9:5605 ..... 4, 18

RULES

Sup. Ct. R. 10 ..... 1, 14

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 31

INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's affirmance of the dismissal of Petitioner's legal malpractice lawsuit in any way represents a departure from the accepted and usual course of judicial proceedings, as to call for exercise of this Court's supervisory power. The District Court correctly applied Louisiana state law in dismissing Petitioner's legal malpractice claims, and the District Court's factual determinations and analysis of Louisiana state law do not warrant the exercise of this Court's supervisory power.

Simply put, Petitioner's arguments that both the District Court and the Fifth Circuit misapplied Louisiana state law and made erroneous factual determinations are insufficient to carry Petitioner's burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF PROCEDURAL FACTS

This legal malpractice case stems from the underlying case, *Rene S. Hartz v. Administrators of Tulane Educational Fund, University Healthcare System, LLC, et al.*, Civil Action No. 06-2977, USDC, Eastern District of Louisiana (hereinafter the "Tulane Suit"). That lawsuit was filed by Dr. Hartz (through her current counsel, Phipps & Phipps) on or about June 8, 2006. In the Tulane suit, Dr. Hartz contended that Tulane discriminated against her on the basis of

her gender by refusing to grant her tenure and retaliated against her, all in violation of Title VII.

Approximately eight days after Dr. Hartz filed her lawsuit against Tulane, she also filed, on June 16, 2006, a legal malpractice lawsuit against Victor Farrugia, and Robert A. Kutcher, Nicole Tygier, Chopin, Wagar, Richard & Kutcher, LLP (the "Chopin defendants"). In the legal malpractice lawsuit, Dr. Hartz contended that if her employment discrimination suit against Tulane was dismissed as time-barred, then she would have a legal malpractice claim against both Victor Farrugia and the Chopin Wagar defendants. Since some of the legal malpractice claims were dependent upon the outcome of the Tulane discrimination suit, the legal malpractice lawsuit was stayed pending resolution of the Tulane suit.

Counsel for Tulane Medical School and Tulane Hospital filed Motions to Dismiss, contending that the claims were time-barred. Tulane argued that the initial EEOC Complaint, filed by Dr. Hartz (with Victor Farrugia) on August 22, 2003 was too late, as it was not filed within three hundred days of the alleged discriminatory conduct by Tulane. According to Tulane's argument, the EEOC charge needed to be filed by April of 2003, but was not filed until August 22, 2003. In response to this time limits argument, Dr. Hartz argued that there were continuing discriminatory acts on the part of Tulane up and through 2003, as well as retaliatory acts taken by Tulane in 2003, all of which rendered the August of 2003 EEOC charge timely.

The District Court denied Tulane's Motion to Dismiss via an Order and Reasons dated March 20,

2007. Both Tulane Medical School and Tulane Hospital moved for reconsideration of the Court's Ruling, but by Orders dated April 23, 2007 and April 25, 2007, those Motions were denied. However, the District Court did grant Tulane's Motion for Certification under 28 U.S.C. § 1292(b), specifically finding that the timeliness issues before the Court "involved a controlling question of law as to which there is a substantial ground for a difference of opinion." The matter was therefore certified to the United States Fifth Circuit Court of Appeal for interlocutory appeal.

After the appeal was lodged in the U.S. Fifth Circuit Court of Appeal, on April 16, 2008, the Fifth Circuit found that the claims against Tulane were time barred because the EEOC charge did need to be filed by April, 2003. The Fifth Circuit found that Dr. Hartz never had a claim for "de facto tenure", and also held that the Tulane Medical School and Tulane Hospital were two separate and distinct entities. Finally, the Fifth Circuit took the time to criticize Dr. Hartz' counsel, for being unprepared and unprofessional in the oral argument. See *Hartz v. Tulane*, 275 Fed. Appx. 281 (5th Cir. 2008). Dr. Hartz neither requested rehearing, nor took any further appeals.

After the termination of the Tulane lawsuit, Dr. Hartz pursued the legal malpractice suit. Through a series of rulings, the District Court dismissed any and all legal malpractice claims against Victor Farrugia as being time-barred. The Court reasoned that any legal malpractice on the part of Victor Farrugia took place in April of 2003, and therefore the plaintiff had until April of 2006 to file a claim against Victor Farrugia

under Louisiana Revised Statute 9:5605. Since this lawsuit was filed on June 16, 2006, it was filed some two months too late. The Court therefore dismissed all claims against Victor Farrugia, and also dismissed any claims against the Chopin defendants concerning either the alleged failure to timely file a state law legal malpractice case, or any claim that they negligently failed to timely file the EEOC charge.[1]

After the District Court's rulings, the sole remaining claim was that it was legal malpractice for the Chopin defendants not to have advised Dr. Hartz (when she came to see them in June 2003) that she should file a legal malpractice suit against Victor Farrugia. The matter was set for trial before the Honorable Judge Zainey without a jury. After discovery, the Chopin defendants filed two separate Motions for Summary Judgment. In the first Motion, the Chopin defendants demonstrated that as a matter of law, the plaintiff could not prove all the elements required under Louisiana law to state a legal malpractice claim against the Chopin defendants. Trial Record at Volume 1, Pages 436-557. The second Motion demonstrated that the plaintiff's claims against the Chopin defendants failed because Dr. Hartz' underlying claim against Tulane lacked merit. Trial Record at Volume 1, Pages 336-435.

Numerous, lengthy memorandum opposing the two summary judgments were filed by Dr. Hartz, as well

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[1] Since the Fifth Circuit determined that the EEOC charge needed to be filed by April 2003, but Dr. Hartz did not even first contact the Chopin defendants until June 22, 2003, by the time Dr. Hartz even called the Chopin defendants, it was already too late to file an EEOC charge, even if Dr. Hartz had requested same.

as her own Motion for Summary Judgment. The Chopin defendants filed a Motion to Strike some of the pleadings filed by the plaintiff, on the grounds that those pleadings were not timely filed and provided to the Chopin defendants pursuant to court rules. Trial Record at Volume 3, Pages 1406-1414.

The Court considered the numerous, lengthy[2] Briefs submitted by the parties, and on March 31, 2009 issued a Ruling granting the first of the Motions for Summary Judgment filed by the Chopin defendants. Trial Record at Volume 3, Pages 1658-1674. Because the District Court agreed with the Chopin defendants' argument that the plaintiff could not prove the requisite elements of a legal malpractice claim pursuant to Louisiana law, the District Court never reached the alternative basis for summary judgment raised by the Chopin defendants.

On Appeal to the United States Fifth Circuit Court of Appeal, the District Court's dismissal of Petitioner's legal malpractice claim was affirmed. Petitioner filed an application for rehearing before the Fifth Circuit, but that application was denied. This Petition for Writ of Certiorari follows.

STATEMENT OF RELEVANT FACTS

Since the Petitioner's Statement of Facts contains several key misstatements and omissions, the Chopin

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[2] At one point, the District Court denied plaintiff's Motion for Leave to File a Surrebuttal Memorandum in Opposition to the Chopin defendants' Motion for Summary Judgment, on the grounds that the proposed memorandum was too lengthy.

defendants submit the following recitation of relevant facts.

On or about May 8, 1997, Dr. Renee Hartz was hired by Tulane University Medical Center for a faculty position in the Department of Surgery at Tulane University School of Medicine. That letter outlined the job responsibilities Tulane expected Dr. Hartz to fulfill. For example, that letter stated.

> I would expect that you would conduct student teaching and resident teaching in surgery with such adjunctive teaching as might be desirable to you in other areas of the medical school. Furthermore, you will become a Co-Program Director for the training program in cardiothoracic surgery. ... I would expect that you would develop an active clinical practice in adult cardiothoracic surgery. With your expertise and experience in minimally invasive cardiac surgery, I hope that you would be able to establish Tulane as a center for this type of surgery. Your clinical practice would be conducted as a member of the faculty practice plan and that organization's rules and regulations would govern your activities in this regard.

Trial Record at Volume 1, Pages 360-362.

At the time of the hire, Dr. Hartz was informed that the position did not automatically grant tenure, but instead she would be considered for tenure in her first year of employment. Within the first six months of her employment, however, Dr. Hartz lost all cardiac

surgery privileges at the affiliated Tulane Hospital[3], due to concerns about her performance and high mortality rates of her patients. Trial Record at Volume 1, Pages 372; and Trial Record at Volume 1, Pages 424-427. As a result of Dr. Hartz' loss of surgical privileges in the very area for which she was hired, the Tulane Department of Surgery's Promotions Committee recommended that her tenure be placed on hold pending the resolution of her surgical privileges status. Trial Record at Volume 1, Page 424. In particular, in January 1999, the Department Promotions Committee issued a memo, stating that it was unable to make a decision on whether to recommend tenure for Dr. Hartz because of significant concerns regarding Dr. Hartz' clinical qualifications in cardiac surgery. Trial Record at Volume 1, Page 424. Subsequently, on March 15, 1999, the Department Promotions Committee issued another memo, finding unanimously that Dr. Hartz had not met the requirements for tenure. Trial Record at Volume 1, Page 424. The Committees' recommendation was concurred in by the Chair of the Department of Surgery, the School of Medicine, and the Dean of the School of Medicine.

Dr. Hartz filed a variety of internal grievances with Tulane, seeking to have her tenure granted in 1999. One such grievance was filed before a University wide Committee on Faculty, Tenure, Freedom and Responsibility ("FTFR").[4] That Committee

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[3] This Court has found that Tulane Hospital and Tulane Medical School are separate and distinct entities.

[4] Dr. Hartz' Brief recites select portions of that committee's 3/31/00 memo. Interestingly, that same FTFR committee (upon

recommended that Dr. Hartz' probationary period be extended three years.

When those grievances did not accomplish what she was seeking, Dr. Hartz also filed a Notice of Charge with the EEOC in 1999. With regards to that dispute with Tulane and the EEOC charge, Dr. Hartz engaged the services of an attorney by the name of Judy Giorlando, with the Law Firm of Taylor, Wellons, Politz & Duhe. Dr. Hartz' EEOC charge was filed on or about October 14, 1999. In that EEOC charge, Dr. Hartz contended that Tulane had discriminated against her by refusing her tenure, and by restricting her operating privileges. She contended that Tulane discriminated against her because of her female gender. Trial Record at Volume 1, Page 373.

On September 27, 2000, the EEOC issued a letter to Dr. Hartz, advising her that the Commission would be discontinuing its processing of the charge because "evidence obtained during the course of the investigation does not support the allegations made in your charge." Trial Record at Volume 1, Page 374. Dr. Hartz received a dismissal and Notice of Rights Letter from the EEOC, but chose not to file a lawsuit against Tulane. Instead, Dr. Hartz entered into a Compromise Agreement with Tulane, whereby she was put on probation for a period of an additional three years, beginning July 1, 2000. Trial Record at Volume 2, Pages 1121-1122. Again, in agreeing to that probationary period, Tulane made it crystal clear that any future tenure decisions would be reviewed based

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which Hartz places much reliance) later voted against granting her tenure.

upon a variety of factors, including her teaching performance and cardiac surgical privileges. However, it was not until January of 2002 that Dr. Hartz' cardiac surgical privileges at Tulane University Health Center were restored. Trial Record at Volume 1, Page 372. By that time Dr. Hartz' had gone approximately four years without cardiac surgical privileges.

Thereafter, Dr. Hartz was considered for tenure once again. On April 22, 2002, the Department's Promotions Committee voted 2-0 to table any consideration of tenure for Dr. Hartz. Due to the effect this decision would have on the pending agreement, which stated that Dr. Hartz must receive tenure or the 2002-2003 school year would be her last at Tulane, the Dean of the School of Medicine informed the PHC ("PHC") of the situation and recommended against tabling any decision on Dr. Hartz. Accordingly, the Chairman of the Department of Surgery, Dr. Robert Hewitt, submitted Dr. Hartz' tenure package to the PHC with a recommendation of not granting tenure to Dr. Hartz. In his submission to the committee, Dr. Hewitt noted that in addition to the fact that she could not fulfill her teaching duties by having students watch her perform said surgeries, Dr. Hartz had created a deficit in the years she worked in his department (because she could not perform the income earning cardiac surgeries she was hired to conduct), had received zero grant money, and had published very few scholarly articles. Trial Record at Volume 1, Page 376-378.

When Tulane considered Dr. Hartz for tenure, the PHC voted seven to two to recommend tenure to Dr. Hartz. In accordance with the School of Medicine's Constitution, the PHC decision was submitted to the

Executive Faculty Committee for final action. On June 20, 2002, the Executive Faculty Committee comprised of professors representing the different departments of the Medical School, met to review the lower committee's decision, and overwhelmingly rejected it. In a 14 to 2 vote, the Executive Faculty Committee decided that Dr. Hartz was not qualified to receive tenure at Tulane.

Dr. Hartz was notified of the Executive Committee's decision on June 21, 2002. At that time, she was also told that the Faculty Handbook granted her another avenue of relief in that the PHC would be given an opportunity to present additional information to the Executive Faculty in favor of its original decision. If supplemental information was received, the Executive Faculty Committee would vote on Dr. Hartz' tenure package again. On July 15, 2002, the PHC submitted supplemental materials to the Executive Faculty for further consideration in Dr. Hartz' tenure decision. On July 16, 2002, the Executive Faculty Committee convened to discuss the additional information provided. The Executive Faculty voted 18 to 4 to deny tenure to Dr. Hartz. Trial Record at Volume 1, Page 379. The Dean of the Medical School concurred with the Executive Faculty Committee's decision and notified Dr. Hartz of such on July 16, 2002. Dr. Hartz was also reminded that the 2002-2003 academic year would be her terminal year. Trial Record at Volume 1, Page 380

Thereafter, Dr. Hartz decided to file a grievance with Tulane over the decision not to grant her tenure. On December 11, 2002, a grievance committee ruled in her favor. The Dean of Tulane University School of Medicine appealed that decision, and the grievance

committee's ruling in favor of Dr. Hartz was reversed on or about March 19, 2003. Trial Record at Volume 1, Page 381. Dr. Hartz appealed to a committee overseeing tenured decisions, but the decision to deny her tenure was upheld by the FTFR in May of 2003. Trial Record Volume 1, Page 382-384. The FTFR's findings were thereafter accepted by Tulane President, Scott Cowen, and Dr. Hartz was therefore terminated by Tulane affective June 30, 2003.

On March 26, 2003, Dr. Hartz hired an attorney by the name of Victor R. Farrugia to represent her interests. The Retainer Agreement between Dr. Hartz and Mr. Farrugia states that the representation is in the matter of "*Hartz v. Tulane University*". Trial Record at Volume 1, Page 465. Dr. Hartz and Mr. Farrugia signed the Agreement on March 26, 2003. That same day, Mr. Farrugia prepared a letter to a Ms. Mary Smith, who was the Associate Vice President and Equal Opportunity/Affirmative Action Compliance Officer for Tulane University. Trial Record at Volume 1, Page 467-469. In that letter, Mr. Farrugia outlined Dr. Hartz' internal grievances with Tulane.

After Mr. Farrugia's March 26, 2003 engagement, he continued to represent Dr. Hartz, preparing numerous letters and e-mails on her behalf. In mid June of 2003, while Dr. Hartz was still engaged in a grievance procedure before Mary Smith of Tulane University, Dr. Hartz had a neighbor contact Robert Kutcher of the Law Firm of Chopin, Wagar, Richard & Kutcher, to see if the firm could give her limited assistance concerning her current tenure negotiations with Tulane. At that time, Mr. Farrugia was apparently on vacation. As the bills from the Chopin

Wagar Firm to Dr. Hartz indicate[5], the first contact between anyone at the Chopin Firm and Dr. Hartz was on June 22, 2003. On June 23, 2003, Nicole Tygier of the Chopin Firm met with Dr. Hartz, and began to assist her in preparing a response letter to Mary Smith at Tulane. The June 24, 2003 and June 25, 2003 time entries in the bills refer to the letter to Mary Smith, who was the EEOC/Affirmative Action Compliance Officer for Tulane University. Ms. Tygier made several revisions and additions to a draft of a letter prepared by Dr. Hartz to Mary Smith, and on June 30, 2003, Dr. Hartz sent the correspondence to Mary Smith under her own signature. Trial Record at Volume 1, Pages 482-489. After the June 30, 2003 letter to Mary Smith was sent by Dr. Hartz, she had no further contact with the Chopin Firm until July 16, 2003. On July 16, 2003, Nicole Tygier of the Chopin Firm spoke with Dr. Hartz, and was told not to take any further action because Hartz' attorney, Victor Farrugia, was going to continue the negotiations with Tulane. Trial Record at Volume 1, Page 471. After July 16, 2003, Dr. Hartz never again communicated with anyone at the Chopin Firm, other than to pay the contemporaneous invoices submitted by the Chopin Firm to her.

After the July 16, 2003 telephone conversation between Dr. Hartz and Nicole Tygier, in which Dr. Hartz told the Chopin Firm that Mr. Farrugia would be handling all matters going forward, Mr. Farrugia continued to represent Dr. Hartz. In fact, on August 22, 2003, Mr. Farrugia went with Dr. Hartz to the office of the U.S. Equal Employment Opportunity

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[5] Trial Record at Volume 1, Pages 470-472.

Commission, on Loyola Avenue in New Orleans, Louisiana. Mr. Farrugia physically went with Dr. Hartz to help her file an EEOC charge against Tulane, in which Dr. Hartz contended that Tulane had discriminated against her on the basis of gender by denying her tenure. Trial Record at Volume 1, Page 387. Again, it is undisputed that Dr. Hartz never contacted the Chopin Firm regarding the filing of this EEOC charge, and in fact, never even notified them that she was filing such a charge. For all the Chopin defendants knew, after July 16, 2003, Dr. Hartz and Mr. Farrugia had successfully negotiated a resolution with Tulane.

After the filing of the EEOC charge, Victor Farrugia continued to represent Dr. Hartz for several years, engaging in a variety of letters, e-mails, and other communications with Dr. Hartz, and the personnel at the EEOC. While Mr. Farrugia was representing Dr. Hartz, on August 29, 2003, Mary Smith of Tulane responded to Dr. Hartz' grievance, stating that she found "no facts to suggest that you were either discriminated against because of your gender, or that any decisions made regarding you were unlawfully motivated by retaliation." Trial Record at Volume 1, Pages 390-391. Again, it is undisputed that Dr. Hartz never notified the Chopin Wagar defendants of this response from Mary Smith.

Dr. Hartz' EEOC claim slowly proceeded forward until March 15, 2006, when she received a dismissal and Notice of Rights Letter from the EEOC, indicating that they would not be pursuing the matter any further. Trial Record at Volume 1, Page 392. After receiving the Right to Sue Letter from the EEOC, Mr. Farrugia wrote several letters to the EEOC, requesting

copies of the relevant file materials. Trial Record at Volume 1, Pages 512-513. He provided those file materials to Dr. Hartz, but on June 1, 2006, he received an e-mail from Dr. Hartz indicating that she was terminating his services. In that e-mail, Dr. Hartz indicated that she was engaging new counsel to represent her interests in a suit to be filed against Tulane. Dr. Hartz' new counsel (Phipps & Phipps) obtained the file materials from Mr. Farrugia, and filed a Complaint against the Administrators of the Tulane Education Fund, University Healthcare System, LLC on June 8, 2006.

REASONS FOR DENYING THE PETITION

In Petitioner's Writ, she contends that there exists "factual disputes" which should have prevented Petitioner's case from being dismissed.

The factual determinations and analysis of Louisiana substantive law made by the District Court and the Fifth Circuit do not represent a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT

A. No Potential Cause Of Action Was Lost By Dr. Hartz During The Representation By The Chopin Defendants

When the Chopin defendants filed their Summary Judgment on the plaintiff's inability to prove the elements of a legal malpractice claim, they addressed two (2) separate shortcomings of plaintiff's claim. The first issue concerned the scope of the representation provided by the Chopin defendants, and the existence of no legal duty on their part to render any advice on any legal malpractice claim.[6] The second issue raised and briefed by the Chopin defendants concerned the legal argument that the plaintiff could not prove any action by the Chopin defendants caused her damage, since any legal malpractice claim against Victor Farrugia remained viable for some two years and nine months after the Chopin defendants representation terminated. Trial Record at Volume I, Pages 455-460.

In granting the Summary Judgment Motion filed by the Chopin defendants, the District Court found in favor of the Chopin defendants on both independent grounds for summary judgment. To be precise, the District Court ruled

> Finally, Hartz's claim against the Chopin Defendants suffers from the additional infirmity

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[6] That issue is discussed *infra*

> in that the legal malpractice claim against Farrugia did not prescribe until April 2006,[7] which is nearly 2 years and 9 months after the Chopin Defendants terminated their relationship with Hartz on July 16, 2003. In *Oyefodun v. Spears*, the Fourth Circuit upheld a trial court ruling that recognized that an attorney could not be liable for legal malpractice when he withdrew from the case almost a year before the case prescribed. 669 So.2d 1261 (La. App. 4th Cir. 1996). Similarly, the Chopin Defendants are not responsible for the loss of a claim that prescribed nearly three years after their representation ended.

See Ruling, Page 16.

Dr. Hartz never addressed or briefed any alleged error by the District Court in finding that the Chopin defendants could not be held "responsible for the loss of a claim that prescribed nearly three years after their representation ended." Ruling at Page 16. Our courts have long held that an Appellant abandons all issues not raised and argued in its initial Brief on appeal. *Cinel v. Connick*, 15 F.2d 1338, 1345 (5th Cir. 1994); *Lewis v. Pugh*, 289 Fed. Appx. 767, 771 (5th Cir. 2008); and *In Re Tx. Mortg. Services Corp.*, 761 F.2d 1068, 1075 (5th Cir. 1985). As the Fifth Circuit recently stated:

> When an appellant fails to identify error in the district court's decision, it is as if the appellant

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[7] Three years after the EEOC charge should have been filed in April 2003.

> had not appealed that judgment, and this court "will not raise and discuss legal issues that [Payne] has failed to assert." *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Similarly, the failure to provide any legal or factual analysis of an issue on appeal waives that issue. *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.2d 256, 260 n. 9 (5th Cir. 1995).

Payne v. Khoshdel, 255 Fed. Appx. 921, 922 (5th Cir. 2007).

Since the Petitioner never addressed or briefed before the Fifth Circuit any alleged error in the District Court's finding that no potential claim was lost by Dr. Hartz during the representation by the Chopin defendants, any objections to that part of the Court's Ruling were waived and abandoned. That portion of the Court's Ruling was therefore uncontested, and the Fifth Circuit could therefore affirm the District Court's holding on that basis alone.

Although Petitioner has waived any objection to this part of the Court's Ruling, it is also clear that the District Court was correct in finding that the Chopin defendants could not be held responsible in legal malpractice for an underlying claim that did not prescribe during their representation. That conclusion is well supported by Louisiana law, as well as the law of our sister states.

In ruling in the *Hartz v. Tulane* case, the U.S. Fifth Circuit found that any EEOC charge needed to be filed by April 2003 in order for it to have been timely. That necessarily means that the malpractice of Victor

Farrugia took place in April of 2003. Pursuant to Louisiana Revised Statute 9:5605, Dr. Hartz would have had until April 2006 within which to file a legal malpractice claim against Victor Farrugia.

The undisputed facts of this case demonstrate that the Chopin defendants only provided limited representation to Dr. Hartz from June 22, 2003 through July 16, 2003. After July 16, 2003, the Chopin defendants ceased any representation of Dr. Hartz, and never heard a single communication again from her, other than for payment of their bills.

At the time that the Chopin defendants ceased representing Dr. Hartz on July 16, 2003, Dr. Hartz had approximately two years and nine months left to file any legal malpractice claim she might have against Victor Farrugia, barring her earlier discovery of that alleged act. Not only did she not lose any potential claim against Victor Farrugia while she was being represented by the Chopin defendants, Dr. Hartz had two years and nine months **after** the time that she terminated the Chopin defendants' representation to file any legal malpractice claim against Mr. Farrugia. As such, in addition to the fact that there was no attorney-client relationship between Dr. Hartz and the Chopin defendants concerning any potential legal malpractice claim against Victor Farrugia, it is also clear that the Chopin defendants' actions could not have caused her any damage, since no right was lost during their representation.

Support for this common sense proposition can be found in numerous Louisiana cases, as well as cases from other jurisdictions. In *Oyefodun v. Spears*, *supra*, the Court analyzed exactly when a plaintiff's

underlying cause of action against a different defendant would have prescribed. After finding that the plaintiff's claim against the original defendant did not prescribe while she was being represented by the attorney, the Court found that the attorney had not committed legal malpractice, and dismissed all claims against the attorney. *Id.* at 1264.

Similarly, in *Darbonne v. Guillory*, 649 So. 2d 681 (La. App. 3 Cir. 11/2/94). The Court analyzed whether or not the plaintiff stated a sufficient cause of action in legal malpractice against her former attorney. The Court first looked to determine exactly when the underlying worker's compensation claim would have become time-barred. After analyzing the applicable time period, the Court determined that the worker's compensation claim did not prescribe while the attorney was representing the client, and therefore the attorney could not have committed legal malpractice. *Id.* at 683. *Accord: Steketee v. Lintz, Williams & Rothberg*, 694 P. 2d 1153, (Ca. 1985); *Harvey v. Mackay*, 440 N.E. 2d 1022 (Il. 9/27/1982) (dismissing a legal malpractice claim where the Court found that it was "apparent that plaintiff had over one year to pursue any potential actions against Harris Bank after defendant withdrew as her attorney"); and *Shelly v. Hansen*, 53 Cal. Rptr. 20 (Ca. 2d Dis. 8/15/1966) (no malpractice claim where the underlying cause of action did not become time-barred while plaintiff was represented by the defendant attorney).

The Chopin defendants simply did not cause Dr. Hartz to lose any potential cause of action, and cannot be held responsible for legal malpractice. As is admitted by the plaintiff, Dr. Hartz never communicated at all with the Chopin defendants after

advising them on July 16, 2003 that Victor Farrugia would be handling Tulane negotiations going forward. At that point, Dr. Hartz had never even discussed the possibility of filing an EEOC charge against Tulane with the Chopin defendants, but rather had expressed her desire to continue negotiations with Tulane. The affidavits of Robert Kutcher and Nicole Tygier confirm this, as do the bills that were received and paid by Dr. Hartz.

Over a month after her last contact with the Chopin defendants, Dr. Hartz decided to file an EEOC charge against Tulane, specifically seeking the assistance of Victor Farrugia. Had Dr. Hartz picked up the phone and contacted the Chopin defendants seeking their assistance on the filing of such a charge, perhaps the Chopin defendants would have had an opportunity to render advice to her regarding the possible defenses or problems with such a claim. Moreover, at any point while that EEOC charge was pending, for approximately two years and seven months, Dr. Hartz could have called, e-mailed, or otherwise communicated with the Chopin defendants, seeking their advice on her current issues with Tulane. She never made such contact, and therefore the Chopin defendants never had the opportunity to address any of the issues of which Dr. Hartz now complains. It would be simply unconscionable to allow a plaintiff to blame an attorney for the loss of a claim, when that claim was lost some two years and nine months after the time that the attorney stopped representing the client on any matters. That is exactly what Dr. Hartz was asking the Court to find. The District Court correctly rejected those pleas.

Because any claim for legal malpractice against Victor Farrugia remained viable for approximately two years and nine months after the time that the limited representation by the Chopin defendants was terminated, the Chopin defendants simply were not the cause of any damage to Dr. Hartz, and the District Court correctly dismissed her legal malpractice claims.

B. The District Court Correctly Held That The Chopin Defendants Owed No Duty To Render Any Legal Advice To Dr. Hartz Concerning Legal Malpractice By Victor Farrugia

In the District Court's well reasoned Opinion, the Court correctly analyzed the law applicable to Louisiana legal malpractice claims. Pursuant to well established Louisiana law, in order to prove a claim for legal malpractice under Louisiana law, the plaintiff must establish the following three elements: (1) an attorney-client relationship, (2) the attorney was negligent in his representation of the client; and (3) that negligence caused plaintiff loss. The plaintiff bears the burden of proof of each of these elements. *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129; *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So.2d 239 (1972); *Francois v. Reed*, 97-1328, p. 4 (La. App. 1st Cir. 5/15/98), 714 So.2d 228, 229-230.

With regard to element number (1) of plaintiff's burden of proof, it has long been the law of Louisiana that:

> "The attorney-client relationship is contractual in nature and is based upon the express agreement of the parties as to the nature of

> work to be undertaken by the attorney. The agreement or consent of an attorney to perform work for a party on a particular matter or transaction does not create an attorney-client relationship as regards other business or affairs of the client. *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, 186 So.2d 454 (La. App. 1st Cir. 1966)."

See Grand Isle Campsites, Inc. v. Chuck, 262 So.2d 350 (La. 1972). See also: *St. Paul Fire & Marine Ins. Co. v. GAB Robbins North America*, 2008 WL 4952777 (La App. 4th Cir. 11/19/08); *Bergman v. New England Ins. Co.*, 872 F.2d 672 (5th Cir. 1989); *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, No. 94-1258, 1997 WL 33473806 at #5 (E.D. La. 11/13/1997) (Fallon, J.). Moreover, as one Court has stated:

> A lawyer owes his client great responsibilities and duties and any obligations of such gravity and magnitude may not be involuntarily thrust upon an attorney.

Olympia Roofing Co., Inc. v. City of New Orleans, 288 So.2d 670, 671 (La. App. 4th Cir. 1974) citing *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, *supra*. With regard to the proper analysis of legal malpractice cases in Louisiana, the District Court Ruling specifically stated that:

> A failure to act will give rise to civil liability only if it occurs within the context of a duty to act. *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, No. 94-1258, 1997 WL 33473806 at #5 (E.D. La. Nov.

> 13, 1997) (Fallon, J.). In the case of legal malpractice duty is defined by the attorney-client relationship. *Id.* (Citing *Grand Isle Campsites, Inc. v. Check*, 262 So.2d 350 (La. 1972); *Delta Equip. & Constr. Co. v. Royal Indem. Co.*, 186 So.2d 454 (La. App. 1st Cir. 1966)). The attorney-client relationship is "purely contractual" and results only from "the mutual agreement and understanding of the parties concerned." *Id.* (quoting *Delta Equip.*, 186 So.2d at 458). "Such a relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay therefore." *Id.* "Authorization to represent a client in connection with a specific legal matter does not imply authorization to handle all others, nor does the agreement or consent of an attorney to represent a [] client in a particular matter create an attorney-client relationship as regards other business or affairs of the client." *Id.*

Trial Record at Volume 3, Pages 1664-1665.

Considering this settled law of Louisiana, the District Court reached the proper conclusion in dismissing plaintiff's legal malpractice claim particularly given the limited involvement of the Chopin defendants with Dr. Hartz and the short period of time they assisted her with her Tulane tenure negotiations.

As the Affidavits from defendants Nicole Tygier and Robert Kutcher demonstrate,[7] when they were contacted by Dr. Hartz on June 22, 2003, they were only requested to assist her with her "Tulane Tenure Negotiations," and in particular with the drafting of a letter to Mary Smith. Dr. Hartz never mentioned the filing of an EEOC charge against Tulane, and of course never even mentioned the possibility of suing Victor Farrugia. These facts are confirmed by the invoices submitted by the Chopin Firms to Dr. Hartz, which were prepared contemporaneously with the services provided by the Chopin defendants. The bills were prepared on July 16, 2003, and August 29, 2003, and clearly note at the top that the work is performed for "Tulane Tenure Negotiations." Trial Record at Volume 1, Pages 470-472. Dr. Hartz admitted that she received and reviewed these bills, and in fact paid them shortly after their receipt.[8]

The Affidavits of defendants Tygier and Kutcher are not only supported by the bills submitted to Dr. Hartz and paid by Dr. Hartz, they are also supported by the events that occurred after their limited assistance to Dr. Hartz. For example, Dr. Hartz continued to engage Victor Farrugia after the Chopin defendants helped her prepare the June 30, 2003 letter to Mary Smith, and after the July 16, 2003 telephone call from Dr. Hartz advising the Chopin defendants that they should take no further action because Mr. Farrugia would be handling the matters going forward. Plaintiff has admitted that Victor Farrugia

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[7] Trial Record at Volume 1, Pages 534-535.

[8] Trial Record at Volume 1, Page 503.

went with her to file the EEOC charge on August 22, 2003, and that in fact he helped her prepare said charge.[10] There are numerous e-mails and pieces of correspondence between Dr. Hartz and Victor Farrugia between July 2003 and June 2006, and numerous communications between Victor Farrugia and the EEOC during that time frame.

What does not exist, however, is one single communication between Dr. Hartz and the Chopin defendants, or between the EEOC or Tulane and the Chopin defendants, between July 16, 2003 and the June 16, 2006 filing of this legal malpractice lawsuit. The records clearly show that Dr. Hartz hired Victor Farrugia on March 26, 2003, paid him a $10,000.00 retainer to represent her interests in her disputes with Tulane, and continued to engage Mr. Farrugia up and until June 3, 2006.

Pursuant to *Grand Isle Campsites, Inc. v. Check* and its progeny, a plaintiff cannot thrust upon an attorney an obligation to opine on matters which were never requested or even raised by the client. The District Court correctly found that the Chopin defendants had no duty to render an opinion or advice concerning the hypothetical malpractice of Victor Farrugia, particularly since the plaintiff has admitted that she never even *raised* that possibility during her conversations with the Chopin defendants.

The similar case of *Buras v. Mara*, 892 So.2d 83 (La. App. 5 Cir. 12/14/04), was cited by the Trial Judge. In *Buras*, a plaintiff sued their ex-attorney for

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[10] Trial Record at Volume 1, Page 501.

legal malpractice, contending that the attorney had committed legal malpractice by failing to timely file a particular legal malpractice action against the client's former attorney. The plaintiff in *Buras* engaged defendant Marx to file a legal malpractice lawsuit against attorney Stephen Caire, concerning Mr. Caire's alleged failure to advise the plaintiff of a settlement offer in prior litigation. The plaintiff contended that Mr. Marx committed legal malpractice by failing to file a separate legal malpractice claim against Caire, which allegedly would have involved an error by Caire in the rendition of an arbitration judgment against the plaintiff. Marx responded by arguing that he had never agreed to file a legal malpractice claim against Caire for the arbitration award, even though that possibility had been raised by the plaintiff. The Court agreed with Marx, finding that he had declined to represent the plaintiff on any legal malpractice claim concerning the arbitration award. *Id.* at 87.

The *Buras* Court then went on to address the plaintiff's claim that when Marx refused to represent her on the arbitration malpractice claim, he had an obligation to tell her of any applicable prescriptive periods that might affect that malpractice claim. Plaintiff relied in part upon the Rules of Professional Conduct, arguing that it was the attorney's obligation to advise him of any pertinent prescription dates when declining to represent him on the arbitration legal malpractice claim. In rejecting that argument, the Louisiana Appellate Fifth Circuit stated that

> "the Rules of Professional Conduct relied on by plaintiff regarding communications with clients and declining representation do not require an

> attorney to give notice of prescription dates when representation is refused." *Id.*

The Court then stated that "the record in this case indicates that Marx did not agree to represent Buras in this claim, and was under no duty to render information or advice to him on this issue. Further, the fact that Marx represented Buras as to other matters did not create a duty on the lawyer's part to advise him on aspects of a claim he declined to handle." *Id.* at 87. The Court therefore dismissed the legal malpractice claims against Mr. Marx and his firm.

While the Court's rationale in *Buras* certainly supports the Chopin defendants' Motion for Summary Judgment, the facts of our case are actually even more compelling. In *Buras*, the defendant attorney had actually agreed to file a legal malpractice suit against an attorney, and the dispute was over whether or not he had agreed to bring a separate but related legal malpractice claim against the same attorney. The *Buras* Court found that the attorney had not agreed to represent the plaintiff on a particular legal malpractice claim, and therefore he had no obligations to file anything on plaintiff's behalf, or to provide him with any advice concerning the applicable prescriptive/peremptive periods. In this case, it is undisputed that the plaintiff never even raised the possibility of suing Victor Farrugia to the Chopin defendants, and therefore (unlike in *Buras*) there was never even a request by the client to render any advice on the specific subject matter at issue. Dr. Hartz attempts to create a duty on the part of an attorney to render advice concerning a claim that she never even requested the Chopin defendants look at, and it is

clear from *Grand Isle* and *Buras* that no such duty exists as a matter of law. *Accord: Dahlin v. Jenner & Block*, 2001 WL 855419 (N.D. Il. 07/26/01); *Joe v. 239 Joint Venture*, 145 SW 3d 150, 159-160 (Tx. 2004).

In this case, Petitioner's complaint does not even allege that she engaged the Chopin defendants to opine on any malpractice by Farrugia. To the contrary, her complaint specifically states that she was *unaware* of any possible malpractice or negligence by Farrugia until June, 2006. See Complaint, Paragraphs 29, 30, 33 and 36. Since there is no proof or evidence that Dr. Hartz ever retained the Chopin defendants to opine on any hypothetical malpractice by Farrugia, under the *Dahlin* analysis (consistent with Louisiana law), Dr. Hartz' malpractice claims were correctly dismissed.

In reaching its decision, the District Court took into account all factors, including Dr. Hartz' deposition, her Complaint, and the unambiguous, contemporaneous documents. The Court rejected Dr. Hartz' attempts to create a legal obligation on the part of an attorney to opine on hypothetical scenarios that had never been requested, or even contemplated, by any of the parties. The District Court correctly rejected the creation of such an expanded duty on the part of the Chopin defendants, and other Louisiana attorneys.

C. No Legal Duty Existed On The Part Of The Chopin Defendants To Render Any Advice On Potential Legal Malpractice Claims Against Victor Farrugia

In the District Court's Ruling, the Court found that the undisputed material facts and the applicable law

compelled the conclusion that the Chopin defendants had no legal duty to provide any advice to Dr. Hartz regarding hypothetical, potential legal malpractice claims against Victor Farrugia. In fact, the District Court noted that since Dr. Hartz had admitted that she never suspected any negligence on the part of Victor Farrugia (and thus never even raised the issue with the Chopin defendants), a finding of a duty to advise Dr. Hartz to sue Victor Farrugia would necessarily mean that the Chopin defendants had a duty to *unilaterally* investigate any and all legal malpractice claims Dr. Hartz might have had against any attorneys. District Court Opinion, Page 15. The Court correctly refused to find such an expansive duty under Louisiana law, particularly given the complicated nature of such advice, and the limited nature of the Chopin defendants' representation. *Id*, at Page 15.

In her Brief, Petitioner relies upon an "expert" report issued by Beth Alston. The District Judge correctly ruled that expert testimony was not needed to determine whether a legal duty existed in this matter, and therefore the Court never needed to address the questionable[11] report issued by Ms. Alston. See *Askanase v. Fatjo*, 130 F.2d 657, 672-673 (5th Cir. 1997) (not allowing expert testimony from an attorney concerning issues of law). As such, Dr. Hartz' current

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[11] Some of the problems and errors contained in Ms. Alston's report were discussed in the Chopin defendants' Opposition to Hartz' Motion for Summary Judgment. Trial Record at Volume 2, Page 810-811.

reliance upon the so called expert report of Ms. Alston is misplaced.[12]

D. The Plaintiff Did Not Come Forth With Sufficient Summary Judgment Evidence To Support Her Legal Malpractice Claim Against the Chopin Defendants

In the District Court's Ruling, the Court set forth the three elements of a legal malpractice claim under Louisiana law. It is the plaintiff's burden to prove all three elements. The failure to prove any one element is fatal to the plaintiff's claim. The undisputed facts in this case demonstrate that Dr. Hartz has not proven her claim against the Chopin defendants.

In Dr. Hartz' trial pleadings and briefs, she attempts to argue that the Chopin defendants have somehow admitted that they were engaged by Dr. Hartz to render far-reaching advice concerning both hypothetical legal malpractice claims against Victor Farrugia, and the filing of a formal EEOC charge against Tulane. The undisputed facts show such an allegation is patently false.

First, Dr. Hartz quotes a paragraph from the Chopin Defendants' Answer, implying that said Answer is somehow inconsistent with the testimony and contemporaneous documents confirming the Chopin Defendants' limited representation of Dr. Hartz. That representation was limited to assisting

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[12] Defendants submitted their own legal malpractice expert report, which of course completely disagreed with the findings of Ms. Alston. Trial Record at Volume 1, Page 546.

Dr. Hartz in the Tulane Tenure Negotiations, and in particular the preparation of a response letter to Mary Smith, the EEOC/Affirmative Action Compliance Officer at Tulane. Plaintiff's argument in this regard is misleading. In their Answer, the Chopin Defendants state:

> 26.
>
> It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, **plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane.** However, plaintiff requested that defendant take no other action while defendant Victor Farrugia was negotiating with Tulane.

(Emphasis Added). Trial Record at Volume 1, Pages 71-81. Black's Law Dictionary defines "Negotiation" as, "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." (Emphasis Added). Black's Law Dictionary (8th ed. 2004).

As a result, any argument by the plaintiff that both the Chopin defendants' Motion for Summary Judgment and the bills submitted to (and paid by) Dr. Hartz somehow contradict the Answer filed by the Chopin defendants, is wholly without merit. In fact, Defendants' arguments are entirely consistent with both the Answer and the contemporaneous bills submitted to Dr. Hartz. The fact that negotiations were ongoing would necessitate a finding that a dispute existed. In other words, if there was no dispute between Dr. Hartz and Tulane, there would be

no negotiations. It is impossible for an interpretation of the phrases to conclude otherwise.

Moreover, Dr. Hartz attempts to manufacture a fact issue by implying that certain time entries on the Chopin bills "might have been" for some broader, formal EEOC charge advice. However, it is undisputed that Dr. Hartz did not even file her EEOC charge until August 22, 2003, over a month after the Chopin Defendants stopped representing her. Trial Record at Volume 1, Page 387. Dr. Hartz has admitted that she never even told the Chopin Defendants of the EEOC charge that she and Victor Farrugia filed,[13] and therefore it is disingenuous at best for plaintiff to try to imply that the Chopin Defendants were working on the EEOC charge, or communicating with the government concerning said charge. See also Trial Record at Volume 2, Pages 677.

Concerning the letter to Mary Smith, the record is clear that Ms. Tygier performed revisions on a draft already prepared by Dr. Hartz (on someone on her behalf). Trial Record at Volume 1, Page 473. The letter to Mary Smith was not an "opinion letter" to Dr. Hartz, in which the Chopin defendants provided her with legal opinions on a wide range of topics. That letter was part of an ongoing internal process at Tulane, in which Dr. Hartz was attempting to pursue her complaints through Tulane personnel. Ms. Tygier proposed some changes to Dr. Hartz' letter to Mary Smith, and then Dr. Hartz signed the letter and sent it out. That letter recites statements allegedly made by Mary Smith and others, which alleged statements

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[13] Trial Record at Volume 1, Pages 505-506.

were put in the letter by Dr. Hartz. Any alleged statement by Ms. Smith that Dr. Hartz should not file an EEOC complaint "until after tenure was denied" is certainly not legal advice on the part of the *Chopin defendants*, despite Appellant's attempts to distort the Smith letter.

Regarding Dr. Hartz' tortured interpretation of the contemporaneous bills submitted by the Chopin defendants, it is clear that these bills accurately reflect the limited work performed by the Appellees. Those bills were prepared and sent to Dr. Hartz by July 2003. Dr. Hartz received then, and paid them. If she had a disagreement with any of the entries, or the work performed by the firm, she certainly would have questioned the bills. She did not. Trial Record at Volume 2, Page 670. Instead, she continued with the representation of her by Victor Farrugia.

The bills submitted by the Chopin defendants clearly include that on July 16, 2003 they had been told by Dr. Hartz that Victor Farrugia would be handling the matter going forward. Trial Record at Volume 1, Page 471. In her Brief, Dr. Hartz engages in a nonsensical analysis of that entry, in an attempt to support her after-the-fact deposition testimony that the Chopin defendants "told her to go back to Victor Farrugia". The bills clearly state otherwise, and they also clearly state that the limited other time entries were for communications with Tulane concerning the Smith letter.[14] Again, if Dr. Hartz disagreed that the

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[14] Similarly, despite Appellant's fanciful ramblings, the references to "EEOC" in the bills did and could only refer to Mary Smith, as

Chopin defendants were providing legal services for "Tulane Tenure Negotiation", or that it was Dr. Hartz who advised the Chopin defendants that Farrugia would be handling the negotiations going forward (all as was clear from the clear language of the bills received and paid by Dr. Hartz), she would have questioned those bills. She did not. Nonetheless, Dr. Hartz has admitted that she never even raised the possibility of any errors by Farrugia with the Chopin defendants, and has admitted that she never even told the Chopin defendants of the EEOC complaint she and Mr. Farrugia filed on August 22, 2003. Trial Record at Volume 2, Pages 673, 674. Therefore, even her distorted reading of the Chopin defendants' bills and related documents cannot change the fact that there never existed a contractual agreement between Dr. Hartz and the Chopin defendants to render any legal advice on the existence of any potential legal malpractice claims against Victor Farrugia.

The uncontroverted facts show that the Chopin Defendants were not requested to advise and did not agree to advise Dr. Hartz regarding either the filing of a formal EEOC charge, or any hypothetical legal malpractice claim against Victor Farrugia. Therefore, there can be no *presumption* of negligence. As a matter of established Louisiana law, the plaintiff bears the burden of proving a duty, the breach of that duty,

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there was no EEOC charge pending at that time. Trial Record at Volume 2, Page 677.

and causation of damages.[15] That is a burden the plaintiff has not, and indeed cannot, meet.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

DAVID S. DALY
ALLEN & GOOCH, ALC
One Lakeway, Suite 1450
3900 N. Causeway Blvd.
Metairie, Louisiana 70002
Phone: (504) 836-5290
Facsimile: (504) 836-5295
Email: daviddaly@allengooch.com
Counsel for Respondents

July 14, 2010

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[15] As discussed *supra*, Petitioner's Briefs never even addresses the undisputed fact that any legal malpractice claim against Victor Farrugia remained viable for almost two years and nine months after the termination of the Chopin defendants' representation.